

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH GREEN,

Defendant-Appellant.

UNPUBLISHED

January 16, 2007

No. 263409

Wayne Circuit Court

LC No. 00-010919-01

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.224b. He was sentenced to concurrent prison terms of 40 to 70 years for the murder conviction and 30 to 60 years for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right.¹ We reverse.

I. Facts and Procedural History

On May 21, 1999, Quan Bell and Raymond Williams were shot inside a van while Bell was in the driver's seat and Williams in the front-seat passenger seat. Both victims were shot by the backseat passenger. Bell died from his injuries, but Williams survived. Defendant was convicted of the shooting.

Williams originally identified a different suspect, Roderick Gaston, from a photographic lineup, but when Williams saw Gaston in person at the preliminary examination, he stated that Gaston was not the shooter and charges against Gaston were dismissed. The police later focused their investigation on defendant. Williams identified defendant as the shooter at a photographic lineup in September 1999.

¹ We note with curiosity that neither the prosecutor nor the defendant requested oral argument on appeal. Given the multitude of issues presented on appeal, the number of trial errors claimed, and the fact that this defendant's previous conviction for this same crime was reversed on appeal (Docket No. 235045), we would have expected both parties to present arguments.

Ricky Jackson, who knew both Bell and defendant, told the police that defendant was the person who got into Bell's van just before the shootings. When Jackson testified at defendant's preliminary examination, however, he recanted his earlier statement and claimed that the police coerced him into identifying defendant. Jackson repeated this testimony at defendant's first trial. However, defendant was convicted of first-degree murder, assault with intent to commit murder, and felony-firearm. In a prior appeal, this Court reversed defendant's convictions and remanded for a new trial based on improper argument by the prosecutor. *People v Green*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2003 (Docket No. 235045).

At defendant's second trial, Williams identified defendant as the shooter and also testified that Bell had addressed the shooter as "Uncle." Bell's girlfriend, Jackie Anderson, testified that Bell customarily used the nickname "Uncle" in reference to defendant. Jackson testified pursuant to a witness detainer requested by the prosecutor. Before he testified, the trial court closed the courtroom to spectators, over defendant's objection, after the prosecutor informed the court that several of defendant's associates from the Young Boys Incorporated gang² were in the courtroom for the ostensible purpose of intimidating Jackson. Jackson identified defendant as the person who got into the back seat of Bell's van just before the shooting. Jackson admitted that he had perjured himself when he gave exculpatory testimony at defendant's preliminary examination and first trial.

II. Defendant's Irrelevant Evidence Argument

Defendant argues that the trial court erred in admitting evidence of a failed cocaine sale between Bell and defendant's nephew, Parrish Green. Defendant argues that because no evidence linked him to this transaction, the evidence was not relevant, and that the prosecutor had no basis to rely on the evidence to support its theory of defendant's motive. We agree.

A prosecution witness unconnected to the actual crime charged, Terrell Howard, testified that Bell had purchased a kilogram of cocaine from Parrish on the day of the shooting, but returned it to Parrish because he was not able to convert it to crack cocaine form. Defendant objected to this evidence on the ground that it was not relevant because there was no evidence that defendant was involved in the drug deal. The prosecutor argued that the evidence was relevant to defendant's motive, because defendant was acting as Parrish's "enforcer" and trying to collect the money that Parrish had refunded to Bell. The trial court allowed the evidence.

We note first that defense counsel filed a pre-trial motion to exclude the evidence, and that the trial judge stated, during the hearing on the motion, that he "would have to wait and see what happens at trial," rather than ruling on the motion then. During trial, when the prosecutor began questioning witness Howard about the drug deal, defense counsel objected on hearsay grounds. The prosecutor responded that the evidence was not offered for the truth of the matter asserted. The trial judge stated: "I'll allow it." Defense counsel objected again: "Let me just for the record indicate that [sic] closing argument, it's going to be argued for the truth of the

² As noted in the prosecutor's brief on appeal, defendant is pictured and discussed in the book *The Autobiography of Butch Jones Y.B.I. Young Boys Inc.*

matter asserted. It's part of alleged motive and I object." The trial court did not respond at all, and the prosecutor continued questioning the witness.

We find that when defense counsel renewed the pre-trial objection to this testimony, the trial judge had an affirmative duty to rule on the objection that was tabled during the pre-trial hearing. That objection was to the relevance of the evidence, and therefore required an MRE 104(b) finding. Failure to make such a finding constitutes a failure to exercise discretion, which is itself an abuse of discretion.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *Aldrich, supra*.

We agree with defendant that the evidence of Parrish and Bell's failed drug transaction was not relevant to defendant's possible motive, because there was no evidence connecting defendant to the transaction or to Parrish's drug activities. There was no evidence that defendant knew about the sale and the refund, that Parrish asked for defendant's assistance in the matter, or that defendant was customarily involved in Parrish's drug-dealing activities. The mere fact that Parrish was defendant's nephew does not make it more probable that defendant was involved with Parrish. Similarly, the circumstances surrounding the shooting do not support a reasonable inference that defendant was acting as Parrish's "enforcer." There was no evidence that defendant discussed the drug deal with Bell or Parrish, or that he demanded a return of the money from Bell. Accordingly, we find that the trial court abused its discretion in admitting the evidence of the failed drug transaction as a motive.

An error in the admission or exclusion of evidence is not a ground for reversal unless refusal to reverse appears inconsistent with substantial justice. MCL 769.26; *People v Mateo*, 453 Mich 203, 212 n 10, 215 n 14; 551 NW2d 891 (1996). The defendant claiming error must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 427-428; 635 NW2d 687 (2001). In this case, given the absolute absence of any physical evidence linking defendant to the crime charged,³ the questionable identification of defendant as the shooter by Williams, and the inconsistent testimony given by Jackson, the weight and strength of properly admitted evidence is insubstantial at best.

Before closing arguments, defense counsel objected to the prosecutor making "any inference that the defendant was a hitman for Parrish." The prosecutor argued that she was "entitled to make a reasonable inference from the evidence." The trial court ruled that it would

³ We presume the probability that the prosecutor here had additional reasons to pursue this conviction against this defendant so zealously, perhaps related to defendant's reputation as reported in news and other publications about his involvement in the notorious Young Boys Incorporated. The prosecutor still must work within the bounds of the law, and here there was simply not enough admissible evidence presented to support her argument.

allow the argument. We find that this ruling was error, and the prosecutor relied improperly on the evidence of the drug deal to bolster the case against defendant by manufacturing a motive argument with no reasonable evidentiary basis. Defendant was prejudiced by the evidentiary error when the prosecutor stated in her closing argument that defendant was on a “mission” to collect the money, or to punish Bell for obtaining a refund.

The prosecutor’s motive argument, because it was offered with no foundation, was in and of itself error meriting reversal. Because that argument relied exclusively on the improper admission of the irrelevant drug deal evidence, that error too mandates reversal.

We note also that even if these issues were not dispositive, the cumulative errors in this case would be. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

III. Defendant’s Closed Courtroom Argument

Defendant argues that the trial court erred when it excluded spectators from the courtroom during Jackson’s testimony. A trial court’s decision whether to close the proceedings to the public is reviewed for an abuse of discretion. *Detroit Free Press, Inc v Recorder’s Court Judge*, 409 Mich 364, 390; 294 NW2d 827 (1980).

Both the federal and state constitution guarantee criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). However, the right to a public trial is not absolute, and some limited exceptions are permissible when there is a compelling reason for restriction. *Id.* A trial court must satisfy four requirements before ordering a total closure of trial:

(1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. [*Id.*]

The prosecutor argued that the overriding interest was the safety of witness Jackson.⁴ However, we note that in the courtroom itself, security personnel and safety measures such as the metal detector at the door to the courthouse were in place to protect the witness. Any threat of harm to this witness as retaliation for his testimony created a danger only after he left the courtroom, and closing the courtroom could not protect against such danger. When defense counsel objected to the closure of the courtroom, the prosecutor stated that persons had been driving past Williams’s house and waiting outside his house since the trial began, and that Jackson’s girlfriend received a call threatening her baby’s life. We find that it was the fact of

⁴ Jackson had previously told a police officer that he recanted his original statement because he was afraid of defendant’s associates, and Jackson was concerned by the arrival of many spectators who had not been present on the earlier days of the trial. The prosecutor informed the court that several of the spectators were defendant’s associates in the notorious Young Boys Incorporated gang.

this witness having testified that created the risk of harm, irrespective of the presence of spectators during that testimony. We cannot agree that any threat to the witness was alleviated by clearing the courtroom of spectators. We further find that the court neither considered reasonable alternatives nor tailored the closing to be no broader than necessary. We find that closing the courtroom was error.

It seems apparent that defendant was prejudiced by this error. The trial court stated that it received a note from the jurors asking why there were no longer any spectators in the courtroom. The trial judge gave the jury this instruction, intending that it would cure any potential prejudice:

The note indicated that the courtroom – why no one was present. That is something not for your concern. You should draw no inference from it whatsoever.

When you deliberate, you should not even make any mention of that because your focus is only on the witnesses and evidence that you need to hear that's admitted in the case.

We cannot agree that this was sufficient protection of defendant's right to a public trial on the facts of this case.

IV. Defendant's Witness Detainer Argument

Defendant next argues that the trial court should have informed the jury that Jackson was released from his witness detainer after he finished testifying.

MRE 611(b) provides, in relevant part, that a "witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 608(a) permits impeachment of a witness by evidence of the witness's reputation for truthfulness or untruthfulness, but MRE 608(b) provides that a party may not introduce extrinsic evidence to prove specific instances of a witness's conduct for purposes of attacking or supporting his credibility. However, a witness's bias or prejudice may be demonstrated by the use of extrinsic evidence. *People v Perkins*, 116 Mich App 624, 628; 323 NW2d 311 (1982).

In this case, defendant elicited Jackson's admission on cross-examination that he was detained for purposes of testifying at trial. Although jurors could infer from this statement that Jackson would be released from that detainer after his testimony, in his testimony Jackson suggested that he expected to remain incarcerated after he testified.⁵ After Jackson testified, the prosecutor asked the court to lift Jackson's witness detainer; defense counsel requested the court to inform the jury of the release, or allow defense counsel to question Jackson about it. The court refused, on the ground that the jury knew that it "was a possibility" that Jackson would be released after testifying. We find, given that Jackson had changed his story previously, that issues of credibility and bias were sufficiently unsettled that the trial judge should have granted

⁵ According to the record, Jackson remaining incarcerated, even after his testimony, for reasons unrelated to this case.

defense counsel's request. Defense counsel should have been allowed to put this evidence going to bias before the jury.

V. Defendant's Hearsay Argument

Defendant also argues that the trial court erred when it permitted Williams to testify that Bell said, "Okay, Uncle" to the backseat passenger before he got into the van, and when it permitted Anderson to testify that Bell used that nickname when referring to defendant. Defendant argues that this evidence was inadmissible hearsay. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *McLaughlin, supra*.

Bell's statement, "Okay, Uncle" was not a statement offered to prove the truth of the matter asserted. "Statement" is defined as (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Bell was not asserting anything when he addressed the passenger by the nickname "Uncle." He was not communicating anything to Williams, who was not a party to the conversation. At most, the statement "Okay, Uncle" asserted Bell's consent to something the passenger proposed, but the testimony was not offered to prove Bell's assent. Accordingly, the trial court did not abuse its discretion in admitting Williams's testimony. Similarly, the trial court did not err in permitting Anderson to testify that Bell used the nickname "Uncle" when referring to defendant. This testimony did not relate to any assertions made by Bell.

VI. Defendant's Improper Civic Duty Comment Argument

Defendant argues that the prosecutor made an improper civic duty argument in her closing and rebuttal arguments. Because defendant did not object to the remarks at trial, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *McLaughlin, supra* at 645. Viewed in context, the prosecutor's remarks that the jury "do justice" by finding defendant guilty were based on the prosecutor's arguments that a guilty verdict was warranted because the evidence established defendant's guilt. Considered in context, the remarks did not amount to an improper civic duty argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Thus, there was no plain error.

VII. Defendant's *Batson* Challenge

Defendant also argues that the prosecutor improperly used peremptory challenges to exclude African-Americans from the jury, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree. In *Batson*, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from challenging potential jurors solely on the basis of race. *Id.* at 89. A defendant claiming a *Batson* violation must first make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Id.* at 94. Once the defendant has established a prima

facie case, the burden shifts to the prosecutor to adequately explain the racial exclusion. *Id.* To overcome a prima facie showing of discriminatory purpose, the prosecutor must articulate a racially neutral explanation for challenging the jurors. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). The trial court must then determine if the defendant has established purposeful discrimination. *Id.*

We review a trial court's *Batson* decision for an abuse of discretion, and we defer to the trial court's evaluation of the prosecutor's state of mind based on demeanor and credibility. The decision on the ultimate question of discriminatory intent represents a finding of fact accorded great deference on appeal, which will not be overturned unless clearly erroneous. *Id.* at 769; *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003); *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). A trial court properly may conclude that the prosecutor acted without a racial purpose if her reasons were genuine, even if they are silly or superstitious. *Purkett v Elem*, 514 US 765, 768-769; 115 S Ct 1769; 131 L Ed 2d 834 (1995).

Here, the prosecutor dismissed one African-American juror because the juror had previously been convicted of a felony and believed that she had been wrongfully convicted. The prosecutor dismissed three other African-American jurors because of their youth, explaining that she preferred jurors who were older than their late thirties. The trial court found these race-neutral reasons were genuine. Although defendant argues that age was an improper reason for excluding jurors, youth and inexperience have been accepted as valid, race-neutral reasons for excluding jurors. See *State v Payne*, 943 SW2d 338 (Mo App, 1997), and *Ealoms v State*, 983 SW2d 853, 856-857 (Tex App, 1998).⁶ Deferring to the trial court's determination that the prosecutor's proffered reasons were sincere and genuine, *Miller-El, supra* at 339; *Harville, supra* at 319-320, we find no *Batson* violation.

VIII. Conclusion

Although defendant's arguments related to hearsay evidence, the prosecutor's civic duty argument, and the *Batson* challenge are not supported by the record, we find that the inclusion of evidence about the drug deal, the prosecutor's use of that evidence to fashion a motive argument, the closure of the courtroom, and the trial judge's refusal to allow defense counsel to put testimony before the jury that witness Jackson's detainer was lifted immediately upon the close of his testimony were each error. While the motive argument alone could be dispositive, because

⁶ To the extent that *State v Zavala*, 259 NJ Super 235, 242; 611 A2d 1169 (1992), suggests otherwise, we note that this decision was rejected by another panel of the New Jersey Superior Court in *State v Bellamy*, 260 NJ Super 449, 457; 616 A2d 1323 (1992). Consequently, we are not persuaded that we should follow *Zavala*.

here there are cumulative errors, we find that reversal is warranted for the reason that cumulative errors deprived defendant of a fair trial.

Reversed.

/s/ Stephen L. Borrello

/s/ Janet T. Neff

/s/ Jessica R. Cooper